SUPREME COURT, U.S.

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1286

WADLEIGH-MAURICE, LTD. and WARNER BROS., INC.,

Petitioners,

v.

THOMAS TAGGART

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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WADLEIGH-MAURICE, LTD. and
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THOMAS TAGGART

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari be issued to review a judgment of the United States Court of Appeals for the Third Circuit that reversed a judgment of the United States District Court for the District of New Jersey dismissing respondent's complaint.

Opinions Below

The oral opinion of the district court is unreported; it is set out together with the court's written order and judgment in Appendix A. The opinion of the court of appeals is not yet reported; it is set out in Appendix B.

Jurisdiction

The judgment of the court of appeals was entered on September 21, 1973. Petitioners filed a timely petition for rehearing *en banc* which was denied by an order dated October 24, 1973. (A copy of said order is included in Appendix B.) On January 16, 1974, Mr. Justice Brennan entered an order extending petitioners' time to file this petition to and including February 21, 1974. (A copy of Mr. Justice Brennan's order is reproduced in Appendix C.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

Questions Presented

1. Does this action escape the rule of *Time, Inc.* v. *Hill,* 385 U.S. 374, and *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29, that the First Amendment bars a suit for invasion of privacy brought by a private individual arising out of an admittedly truthful and accurate report of his involvement in an event of admitted significant public interest, because respondent claims that petitioners' agents selected him from among those present at the event, interviewed him before motion picture cameras and included the complete interview in a documentary film about the event which has been released on a commercial basis to the general public?

2. In an action for invasion of privacy growing out of an event of admitted public interest where the defense of constitutional privilege is asserted, is it error to segregate a single incident from the totality of circumstances which makes up the event and determine whether it, standing alone, is an event of public interest warranting application of the rule of *Time, Inc.* v. *Hill, supra* and *Rosenbloom* v. *Metromedia, Inc., supra,* to an accurate and truthful recounting thereof?

3. Where one is selected from a crowd at an event of admitted public interest and is filmed and interviewed in connection with his participation in that event and receives no remuneration therefor, the interview being thereafter accurately reproduced in a commercial, documentary motion picture about the event, allegedly to the financial benefit of the producer and distributor of the film, may he, consistent with the First Amendment as construed by this Court, maintain an action for invasion of privacy?

4. Did the district court err in granting petitioners' motion for summary judgment dismissing the complaint?

Constitutional Provision Involved

That portion of the First Amendment to the United States Constitution involved herein reads as follows:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

Statement of the Case

1. *Proceedings Below.*

Respondent Thomas Taggart (plaintiff below) commenced this diversity action for invasion of privacy in June 1970 by filing a complaint in the United States District Court for the District of New Jersey. The complaint alleges that he was sent by his employer, the Port-O-San company, a corporation engaged in the business of furnishing and servicing portable latrines, to Bethel, New York in August 1969 to service the latrines supplied by the company to the promoters of the Woodstock Festival. He alleges that while engaged in his labors petitioners' agents engaged him in a conversation which was recorded on film and subsequently used in the motion picture *Woodstock*. He alleges that his inclusion in the film has subjected him to public ridicule and embarrassment. For this purported

invasion of his right to privacy, respondent seeks $250,000 compensatory damages and $1,000,000 punitive damages.

Petitioners answered denying liability primarily on the ground that since the motion picture *Woodstock* was a true, accurate and non-fictional recounting of a newsworthy event which aroused great public interest, the decisions of this Court construing the First Amendment to the Constitution barred the relief sought.

The parties conducted discovery, including respondent's deposition, and in October 1971 petitioners filed a motion for summary judgment supported by affidavits and voluminous exhibits. On November 8, 1971 the district court viewed an 18 minute segment of the three hour film, which included the 2¼ minute interview of respondent, and heard oral argument on the motion. The court (Hon. Frederick B. Lacey) announced from the bench that the motion would be granted. An order dismissing the complaint was duly entered on January 6, 1972 and respondent appealed.

The Third Circuit Court of Appeals directed that the appeal be submitted on July 2, 1973 without oral argument before a two-judge panel. On July 11, 1973 that panel (Circuit Judges Gibbons and Hunter), without viewing the film, filed an opinion and judgment reversing the judgment of the district court. Petitioners thereupon filed a timely petition for rehearing or rehearing *en banc*. On August 7, 1973, the Third Circuit granted the petition for rehearing, vacated the July 11, 1973 judgment and directed the appeal be heard before the original panel plus Circuit Judge Van Dusen. On September 5, 1973 the court viewed the sequence of the motion picture *Woodstock* which had been shown to the district court and heard oral argument. On September 21, 1973, by a split decision (Judge Van Dusen dissenting) the court again reversed the judgment of the district court and ordered the matter remanded for trial. The majority opinion, authored by Judge Gibbons, was

identical to the vacated July 11 opinion, except that a final paragraph was added which dealt with Judge Van Dusen's dissenting opinion. Petitioners' timely petition for rehearing *en banc* was denied by an order dated October 24, 1973.

2. *The Undisputed Facts.*[1]

A. *The Woodstock Festival.* The Woodstock Music and Art Festival (commonly known as the "Woodstock Festival"), which was held in Bethel, New York between August 15 and 17, 1969, brought together approximately 500,000 young people for three days of "peace and music". The Festival presented performances by the most prominent attractions in the rock music field. But the migration of 500,000 young Americans from all over the United States to a small farm in the Catskill Mountains, which turned a dairy farm into the third largest city in New York State, was an event of far more significance than just another music festival. The problems of water, food, sanitation, health, law enforcement, weather, living conditions, transportation and the like rendered the Festival *the* major news event of that August weekend. The Festival received national and international news coverage by all the media. For example, the *New York Times* featured the story on the front page in its August 16, 17, 18, 19 and 25 issues; *Life* magazine published a special 64 page issue devoted exclusively to the Festival; and the television networks included stories on the event in their national news telecasts on August 16 and 18.

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[1]The facts set out herein are taken from the respondent's deposition, the uncontroverted affidavits submitted in support of the motion for summary judgment, including exhibits, and the actual filmed interview of respondent, as included in the motion picture *Woodstock*, which was viewed by both of the courts below. All quotations from newspapers or magazines are taken from materials submitted to the district court in support of petitioners' motion for summary judgment.

Beyond that, the Woodstock Festival was also a socio-political event which some regard as the efflorescence of the ethic of the post-World War II generation. It was the ultimate statement of the attitudes, mores and philosophy of the generation that came of age in the sixties. As *Time* magazine noted in its August 29, 1969 issue, the "real significance of Woodstock can hardly be overestimated." The Festival was "the moment when the special culture of U.S. youth of the '60s openly displayed its strength, appeal and power," and as such "it may well rank as one of the significant political and sociological events of the age." (Page 32). The adherents of the life-style and socio-political philosophy which manifested itself during the Festival are to this day referred to as members of the "Woodstock Nation."

B. *The Film.* The motion picture *Woodstock* accurately reports the events which took place at the Festival. It was filmed and edited as a "news reportage documentary feature"[2] and includes no fictional or staged sequences of any kind. The events were captured for the film's producer, petitioner Wadleigh-Maurice, Ltd., by 14 camera crews under the direction of Michael Wadleigh. In addition to the Wadleigh-Maurice, Ltd. personnel there were also present many cameramen and soundrecorders from television stations, news bureaus and the print media. Materials from these sources were acquired by the producer to be used with their own film in the final editing process. Some 120 hours of film were reviewed and edited to a length suitable for public exhibition. In the end, a three hour and four minute documentary emerged.

The film was released in New York on March 27, 1970 and was subsequently distributed throughout the United

[2]Affidavit of Robert Maurice dated September 14, 1970.

States by petitioner Warner Bros., Inc. The film received wide critical acclaim and was awarded the "Oscar" by the Academy of Motion Picture Arts and Sciences as the best feature length documentary of 1970.

The film focuses alternatively on the performances of the professional musicians and the doings of the hundreds of thousands of people who came to, lived and worked at the Festival. "The blazing excitement generated by the musicians is cooled by footage in which the kids, the adults in the nearby towns, and the festival promoters are interviewed."[3] As producer Robert Maurice explains in his affidavit, "[s]ince the significance of Woodstock was the joining and mixing of people, the film . . ., to be accurately representational, had to include facts and events relating to individuals." The result is a documentary film which presents "an accurate report of the festival." *(Ibid)* It is also an artistically valid and successful work of the cinematographic art—witness the Oscar it won. But it is something more "than just a documentary record of a newsworthy event"[4] and an artistic triumph, *Woodstock* "is not so much a documentary film as it is a document" for future historians and sociologists.[5] In a word, *"Woodstock* is an important film because it is a picture about one of America's most important recent events."[6]

C. *Respondent's Appearance in the Film.*[7] Respondent was approached by two agents of petitioner Wadleigh-Maurice, Ltd., while he was engaged in servicing the Port-O-San latrines at the Woodstock Festival. He was filmed

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[3]*Senior Scholastic,* May 18, 1970, p. 24.
[4]*Ibid.*
[5]*Mademoiselle,* June 1970, p. 170.
[6]*Catholic Film Newsletter,* April 15, 1970.
[7]Petitioners are lodging with the Clerk of the Court the 18 minute reel of film from the motion picture *Woodstock* which was viewed by the courts below. It includes respondent's 2¼ minute appearance in the film.

and interviewed while engaged in his labors, and he was aware of the fact that he was being filmed. While respondent did not know what use would be made of the film, he did see the camera and made no objection to being filmed and questioned.[8]

The sequence involving respondent which appears in the motion picture *Woodstock* lasts about two minutes and 15 seconds. A viewing of the film will reveal that respondent actually initiated the conversation prior to being asked any questions by petitioners' agents. The conversation focused on the toilet facilities being serviced for use by persons at the Festival and respondent's volunteered statement as to his general attitude toward being at the Festival and working for the "kids." The text of the entire sequence is as follows:

Taggart: "Okay.
Somebody left their cane in here.
Some poor fellow will come looking for his cane."

Male Voice: "You're getting a little behind on this job aren't yuh?"

Taggart: "Oh, they've been behind right along, besides it's not the idea of being behind it's you just can't keep up that's what it is."

Male Voice: "Usin' a-quite a bit o' that stuff, huh?" [Referring to a spray.]

Taggart: "Yeah. That helps give yuh a little pleasanter, uh, odor, you know. Yeah, with the disinfectant in there and you

[8] "Q. You knew you were being photographed while you were being photographed? A. Yes. Q. Did you ever tell the two gentlemen who were photographing you that you did not want your picture taken? A. No." (Deposition of Thomas Taggart, p. 45.)

put your deodorant bars in, makes it a little more pleasanter to go in there an' use it.

Taggart: "That is it, gentlemen."

Male Voice: "Well, you're doin' a good job here.

Taggart: "Thank you very much. [Laughs]
Glad to do it for these kids.
My son's here too.
An' I got one over in Viet Nam too.
He's up in the DMZ right now.
Flyin' helicopters.
Okay, see yuh later."

Respondent concedes that the sequence is a truthful, accurate, complete recording of the interview, which has not been changed or distorted in any way by editing techniques.[9]

The sequence in which respondent appears was noted in some of the press reaction to the film. Kathleen Carroll of the *New York Daily News* called it the "funniest scene" in the film. *Senior Scholastic* called it the "best of the interviews" and called respondent a "proud" man. Craig McGregor, writing in the *New York Times* of April 19, 1970, noted the significance and irony of the circumstances on that August 1969 weekend when hundreds of thousands of America's young were seeking peace at Woodstock while an equal number were making war in Viet Nam: "... the man who is the real schizophrenic hero of Woodstock [is] the Port-O-San man who empties the latrines of the beautiful people and has one son there at Woodstock and another flying a DMZ helicopter in Vietnam."

[9] "Q. Have you seen the motion picture 'Woodstock'? A. Yes, I did. Q. Is the scene depicted therein which you allege contains your picture, an accurate reproduction of the interview that you had with these two gentlemen? A. Yes, I would say it is..." (Deposition of Thomas Taggart, p. 13.)

3. *The Decisions Below.*

Respondent's briefs to the courts below both concede, in the same language, that he "does not claim that the segment of film of which he complains was fictionalized, nor does he contend that the Music Festival itself was not newsworthy." (Briefs, p. 6.) Respondent also concedes that if petitioners' agents had merely picked him out of the crowd with their cameras, filmed him in the performance of his labors and subsequently included that film in the motion picture *Woodstock,* he would have no claim for invasion of privacy. (See Appendix B at 7b, 13b.) Rather, respondent seeks redress because he was drawn out of the multitude by petitioners' cameramen and interviewed by them with the resulting film being used by petitioners in a commercial motion picture. He claims that his right of privacy was infringed by thus focusing public attention on him in a commercial motion picture, to his embarrassment and petitioners' financial gain.

Petitioners conceded below, and concede here, that respondent was "drawn out" and selected by their cameramen for an interview and that petitioners' film editors chose to include the sequence in the film as released to the public. The argument advanced was that neither fact was of constitutional significance and as a matter of law respondent could not recover because of the use of the interview in the film.

District Judge Lacey apparently viewed respondent's claim as seeking redress for the deliberate appropriation of respondent's visage and personality in order to gain a profit without compensation to him.[10] While he thought "there is still an area [of privacy] where that [appropriation for financial benefit] is not protected by the First Amendment

[10] *See Restatement 2d, Torts* § 652C (Tentative Draft No. 13, 1967); Prosser, *Torts* (4th ed. 1971) § 117 at 804-807.

cases," this case did not fall on that side of the line. (Appendix A at 3a.)

By a divided vote, the court of appeals reversed. Focusing on the fact that the film *Woodstock* was a commercial venture, the majority opinion apparently holds that where one "deliberately draws" into "conversation" a participant in a newsworthy event "for the purpose of making him an inadvertent performer in a [film] sequence intended to be exploited for its artistic effect" (Appendix B at 7b) the First Amendment does not bar a suit for damages even if the sequence used in the motion picture is a truthful and accurate recounting of the conversation.

Judge Gibbons accurately observes that the district court's grant of summary judgment in favor of petitioners was based on a holding that "because Taggart was a participant in a newsworthy event" he was "outside the protection" of New York's statutory or New Jersey's common law right of privacy. (*Ibid*)[11] Without the citation of any supporting authority, that conclusion is held to have been erroneous as being "predicated upon a more absolutist interpretation of the first amendment than has yet been espoused by a majority of the Supreme Court." (Appendix B at 9b.)

The majority opinion clearly implies that since respondent's contribution to the Woodstock Festival amounted to nothing more than the performance of ordinary labor, which was in and of itself not a matter of public interest, the defense of constitutional privilege does not apply.

There was no dispute in the record before the courts below as to the facts and events giving rise to this litigation. The parties have, however, characterized or labeled those

[11]In order to decide the constitutional issues raised by the motion for summary judgment it was not necessary that the courts below resolve the issue of choice of law, and neither did.

facts in different ways. Respondent contends the facts of record cast him in the role of one who was "drawn out and made an involuntary performer" in a commercial venture. Petitioners counter that he was "a mere participant in a newsworthy event." (Appendix B at 8b.) Focusing on this battle of labels and ignoring the record,[12] the majority of the court of appeals concluded that the case should be remanded for a jury trial to resolve "disputed fact issues." (Appendix B at 9b.)

Judge Van Dusen's dissent is total. Cutting through the battle of labels to the heart of the case, he wrote:

> "... the central issue before the district court was whether the rule of *Time, Inc.* v. *Hill,* 385 U.S. 383 (1967), applied to the facts of this case. The question of whether or not Mr. Taggart was a participant in a newsworthy event, even if properly characterized as one of fact, involves a constitutional decision as to the proper application of a First Amendment standard." (Appendix B at 10b-11b.)

Since respondent's claim for relief because he was "drawn out" raises the issue "whether the brief questioning of Mr. Taggart in the midst of the Woodstock Festival was an event of public interest," Judge Van Dusen concludes that this case was an appropriate one for summary disposition. (Appendix B at 12b-13b.)

Judge Van Dusen's view of the constitutional issue is simply that "it seems clear that this case falls within the rule of *Time, Inc.* v. *Hill, supra.*" (Appendix B at 13b.)

[12]Lest there be any further confusion arising from the use of different labels applied to the same facts, petitioners concede that respondent was drawn out in the sense of being chosen, that the interview of respondent was elicited by their agents, and that during the interview respondent became an active subject or "performer" rather than a passive face in the crowd. Petitioners' submission is that no matter how the facts are characterized the events are non-actionable under constitutional precepts.

REASONS FOR GRANTING THE WRIT

This case warrants review by this Court because it raises important issues under the First Amendment and the decisions of this Court construing that constitutional proscription, primarily *Time, Inc.* v. *Hill,* 385 U.S. 374 and *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29. It is petitioners' submission that the decision of the majority of the court of appeals conflicts with the prior decisions of this Court and with every lower court decision determining similar cases. On a more basic level, petitioners submit that the decision below was clearly wrong and that unless reversed by this Court may serve as the starting point for a significant departure from thus far unquestioned principles governing the application of the First Amendment's speech and press clause. Finally, this case warrants review because it presents issues of importance to a wide variety of interests operating under the protective shield of the First Amendment, namely film makers, journalists (including print, radio and television), and authors of non-fiction works. Unless reviewed and reversed, the decision below may well inhibit the way in which they report events of general public interest.

1. In a series of decisions beginning with *New York Times Co.* v. *Sullivan,* 376 U.S. 254, this Court determined that the First Amendment guarantees of free speech and press constitute a constitutional defense to the torts of defamation and invasion of privacy. *See Curtis Publishing Co.* v. *Butts,* 388 U.S. 130; *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29; and *Time, Inc.* v. *Hill,* 385 U.S. 374. These civil actions have been limited by a rule of constitutional dimension which holds that if a protected form of speech constitutes a genuine attempt to communicate with others concerning matters of "public or general interest" then liability may not be founded upon that exercise of First

Amendment rights. Liability can be imposed only when what appears to be an attempt to communicate on matters of public interest is a "sham" in that the speaker knows his statements are false or speaks with reckless disregard of whether they are true or false.

With specific reference to claims for invasion of privacy, this Court held in *Time, Inc.* v. *Hill, supra,* that the constitutional protections for speech and press preclude the imposition of tort liability "to redress false reports of *matters of public interest* in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." 385 U.S. at 388 (emphasis supplied).[13] In *Rosenbloom* v. *Metromedia, Inc., supra,* in the defamation context, this Court made it clear beyond further contention that in determining the applicability of the constitutional privilege the focus must be exclusively on the event itself and not the nature of the individual participants.

> "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is, involved, or, because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety. . . . We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." 403 U.S. at 43-44.

[13] *See also Pickering* v. *Board of Education,* 391 U.S. 563, 573.

These rules are premised on certain basic principles which govern in all cases where First Amendment rights are at stake. *First,* the constitutional safeguard "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States,* 354 U.S. 476, 484. *Second,* the Amendment evinces "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wideopen . . ." *New York Times Co.* v. *Sullivan, supra,* 376 U.S. at 270. *Third,* "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama,* 310 U.S. 88, 102. *Fourth,* "[t]hose guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society." *Time, Inc.* v. *Hill, supra,* 385 U.S. at 389.

The rule of constitutional privilege announced in *Time* and *Rosenbloom* is also reflective of the fear that absent a strict rule of constitutional privilege the media will, in order to avoid the risk of large verdicts and protracted litigation, engage in "self-censorship and thus create the danger that the legitimate utterance will be deterred." *Rosenbloom* v. *Metromedia, Inc., supra,* 403 U.S. at 50. *Accord, Time, Inc.* v. *Hill, supra,* 385 U.S at 389; *New York Times Co.* v. *Sullivan, supra,* 376 U.S. at 279.

2. Within this general context, the first question in this case that one must resolve is what constitutes a matter of public concern and interest. Petitioners submit the concept is exceedingly broad and flexible and includes within its parameters the thoughts and activities of all who in any

way participated in the Woodstock Festival. As this Court explained in *Time, Inc.* v. *Hill, supra,* 385 U.S. at 388:

> "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press."

Even if the Woodstock Festival is regarded as nothing more than a large, weekend gathering of rock music fans and musicians the thoughts and activities of those present come within the rubric of subject of public concern and interest so that reports on what transpired are constitutionally protected. "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression." *Bridges* v. *California,* 314 U.S. 252, 269; *Time, Inc.* v. *Hill, supra,* 385 U.S. at 388.

As the court of appeals viewed this case, respondent was an individual of no public consequence performing a task of no public consequence so that the rules of constitutional privilege do not apply. Petitioners submit that that conclusion is in conflict with the opinions of this Court, especially *Time, Inc.* v. *Hill* and *Rosenbloom* v. *Metromedia, Inc.* Respondent concedes that the Woodstock Festival was a newsworthy event of public interest. Since the filmed interview of respondent focused on at least three integral and essential elements involved—namely,

1) providing adequate sanitation facilities for 500,000 people who suddenly assembled in a barren pasture; 2) the so-called "generation gap"; and 3) the fact that the brothers of those attending the festival of "peace and music" were simultaneously embroiled in a war in Viet Nam—it is a form of protected speech.

"The existence, then, of a reasonable relationship between the general subject matter of . . . [*Woodstock*] and the reference to the plaintiff, and a reasonable coextensiveness of the subject matter and the reference, . . . renders . . . [respondent's] prior personal anonymity or notoriety unimportant." *Kent* v. *Pittsburgh Press Co.*, 349 F. Supp. 622, 627 (W.D. Pa.). While respondent did not open the door to the reporting of any and all of the details of his private life by his attendance at an event of public interest,[14] the Constitution mandates that his actions at and thoughts on the Woodstock Festival can be truthfully reported by the media without fear of tort liability.

A number of other courts have faced analogous claims for relief, either in defamation or privacy, brought by non-public individuals contending that a report on a certain aspect of their lives, thoughts or activities were of no public interest or concern and therefore not constitutionally privileged. We are unaware of any decision which has upheld such a contention; in this regard the opinion of the court of appeals herein is unique.

In *Man* v. *Warner Bros., Inc.*, 317 F. Supp. 50 (S.D.N.Y.) relief was summarily denied to a man who came to the Woodstock Festival looking for his son and was asked to play mess call on a flugelhorn he was carrying, which incident was included in the film *Woodstock*. In

[14]Petitioners do not contend that no area of a person's activities falls outside the area of public or general interest, *see Rosenbloom* v. *Metromedia, Inc., supra,* 403 U.S. at 44 n. 12, 48; rather, they submit that the specific filmed sequence here at issue does not fall outside that protected area.

Cullen v. *Grove Press, Inc.*, 276 F. Supp. 727 (S.D.N.Y.), injunctive relief was denied correctional officers of the Bridgewater Correctional Institution who objected to the inclusion of scenes showing them going about their labors in the documentary film entitled the *Titicut Follies* which was being commercially shown in New York. Summary judgment was granted defendant in *Goldman* v. *Time, Inc.*, 336 F. Supp. 133 (N.D. Cal.), where plaintiffs complained about the inclusion in *Life* magazine of their photographs and an interview in connection with a story about young Americans who had left the United States and were wandering through Europe. The same result was reached in *Kent* v. *Pittsburgh Press Co., supra,* which arose from a story about prison conditions and reform which briefly focused on a prisoner who was being released at the time the reporter was visiting Western Penitentiary. In *Gordon* v. *Random House, Inc.*, 349 F. Supp. 919 (E.D. Pa.) the result is again the same in an action growing out of the publication of a book entitled *The Negroes and the Jews* which in a prologue focuses on the history, plight and views of one Max Gordon, a simple Jewish merchant in North Philadelphia. *See also Firestone* v. *Time, Inc.*, 460 F. 2d 712 (C.A. 5), *certiorari denied,* 409 U.S. 875 (reference to woman's retention of private detective to conduct surrepticious surveillance of her husband in *Life* magazine story on electronic eavesdropping); *Sellers* v. *Time, Inc.*, 299 F. Supp. 582 (E.D. Pa.), *aff'd on grounds of state law,* 423 F. 2d 887, *certiorari denied,* 400 U.S. 830 (story about businessman-golfer who hit a golf ball backwards resulting in the loss of an eye by a playing partner); and *Gertz* v. *Robert Welch, Inc.*, 471 F. 2d 801 (C.A. 7), *aff'g* 322 F. Supp. 997 (N.D. Ill.), *certiorari granted,* 410 U.S. 925, argued November 14, 1973, 42 U.S.L.W. 3303 (references in magazine article to attorney conducting civil damage suit on behalf of young man killed by police officer). *Cf., Bon*

Air Hotel, Inc. v. *Time, Inc.*, 426 F. 2d 858 (C.A. 5); *Cantrell* v. *Forest City Publishing Co.*, 484 F. 2d 150 (C.A. 6).[15]

3. It is not petitioners' contention that the constitutional privilege is so sweeping as to foreclose liability in every case involving the truthful report of an event or subject of admitted public interest, for that is not the case at bar. Where the report contains revelations "so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency," *Sidis* v. *F-R Pub. Corp.*, 113 F. 2d 806, 809 (C.A. 2), *certiorari denied*, 311 U.S. 711; *Time, Inc.* v. *Hill, supra*, 385 U.S. at 383 n. 7, or involves an intrusion into the bundle of constitutionally protected private rights given voice and protection in *Griswold* v. *Connecticut*, 381 U.S. 479, liability in tort may well lie. *See, e.g., Commonwealth* v. *Wiseman*, 356 Mass. 251, 249 N.E. 2d 610, *certiorari denied*, 398 U.S. 960; *Smith* v. *Goro*, 66 Misc. 2d 1011, 323 N.Y.S. 2d 47 (Sup. Ct. N.Y. Co.). *Cf., Dietemann* v. *Time, Inc.*, 449 F. 2d 245 (C.A. 9). However, photographing respondent at his job of cleaning latrines can hardly be regarded as offensive to community standards of decency. Similarly, this case does not involve intrusion upon the private aspects of respondent's life "since, by hypothesis, the individual is involved in matters of public or general concern." *Rosenbloom* v. *Metromedia, Inc., supra*, 403 U.S. at 48.

4. What remains is respondent's rather amorphous claim that because some regarded the interview of him in-

[15]See also the following decisions denying relief in cases wherein the plaintiff sought relief based on his or her being filmed or photographed while in public and the subsequent use of the film or photograph in a motion picture or publication. *Murray* v. *New York Magazine*, 27 N.Y. 2d 406, 318 N.Y.S. 2d 474, 267 N.E. 2d 256; *Humiston* v. *Universal Film Manufacturing Co.*, 189 App. Div. 467, 178 N.Y.S. 752; *Jenkins* v. *Dell Publishing Co.*, 251 F. 2d 447 (C.A. 3) (*en banc*), *certiorari denied*, 357 U.S. 921; *Klein* v. *McGraw Hill, Inc.*, 263 F. Supp. 919 (D.D.C.).

cluded in *Woodstock* as humorous, and since the film was commercial entertainment, this case involves an invasion of privacy by appropriating respondent's visage and personality for petitioners' financial advantage without remuneration to him. This theory was accepted by the court below and has already been reinforced by a subsequent district court opinion which concludes that "the message of *Taggart* appears to be that the First Amendment does not absolve movie companies—or publishers—from the obligation of paying their help. They are entitled to photograph newsworthy events, but they are not entitled to convert unsuspecting citizens into unpaid professional actors." *Grant* v. *Esquire, Inc.*, F. Supp. (72 Civ. 1041, Nov. 27, 1973) (S.D.N.Y.).[16] Petitioners submit that this theory is clearly wrong and surely dangerous.

Motion pictures are a form of protected speech. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501. Information and entertainment are not mutually exclusive categories in applying the constitutional standard. It is "neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment in determining the extent to which publication is privileged." *Jenkins* v. *Dell Publishing Co., supra*, 251 F.2d at 451. *Accord, Mistrot* v. *True Detective Publishing Corp.*, 467 F.2d 122, 124 (C.A. 5); *Winters* v. *New York*, 333 U.S. 507, 510. Because "[w]hat is one man's amusement, teaches another's doctrine" (*ibid*), it is not for "any court to pass value judgments predicated upon ephemeral subjective considerations which would serve to stifle free expression." *Paulsen* v. *Personality Posters, Inc.*, 59 Misc. 2d 444, 450, 299 N.Y.S. 2d 501, 508 (Sup. Ct. N.Y. Co.). *See also Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390.

[16]The *Grant* case involves a claim for invasion of privacy and of the "right of publicity" growing out of the reuse of a portion of a 1946 photograph of the actor Cary Grant in a 1971 magazine story concerning current fashions.

That *Woodstock* was produced and distributed by petitioners in order to earn a profit on their investment of time and money is totally without constitutional significance. *Joseph Burstyn, Inc.* v. *Wilson, supra,* 343 U.S. at 501; *Time, Inc.* v. *Hill, supra,* 385 U.S. at 397.

A truthful, non-offensive report of the activities of one participating in an event of public interest or concern does not give rise to a claim for remuneration which if not met will mature into a cause of action for invasion of privacy. If it did no television or radio newsman, no magazine reporter, no documentary film maker could ever again pursue the personal interview, a "common and important technique of investigative reporting" (Appendix B at 13b, Judge Van Dusen dissenting), without fear that the interviewee will subsequently demand compensation for his "performance".

Respondent's point of view, as endorsed by the majority of the court below, would require that, even as to truthful reports concerning people or events of public interest, the press, in order to avoid the censorial threat of suit, would be required to eschew all interviews of non-public figures unless all interviewees signed written releases or were paid. Petitioners submit that this notion is wholly inconsistent with the constitutional commitment to free press and speech in an open society. Whereas the "Candid Camera" type of movie or television show may have to offer remuneration to those who are photographed and interviewed in "staged" or fictionalized incidents,[17] the application of such a rule to this type of case would cause havoc in the field of journalism.

While the court of appeals recognized the potential "chill" to the exercise of petitioners' First Amendment

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[17]See Judge Van Dusen's dissent, Appendix B at 13b, and *Mensie* v. *Funt,* Docket No. L 39093—69 (Super. Ct. N.J. Union Co.) arising out of just such a staged incident in the motion picture *What Do You Say to A Naked Lady* produced by Allen Funt.

rights by its holding, it evaluated that chill in terms only of the interests of the litigants to this case. It ignored the rights of the public at large and the potential impact of its decision on the public's right to be informed on all matters of public concern and interest. (See Appendix B at 9b.) Because the majority below failed to appreciate the fact that the immunity asserted by petitioners under the First Amendment was fashioned "more for the protection of the public generally than it [was] for the publisher himself," *Firestone* v. *Time, Inc., supra,* 460 F.2d at 719, it failed to perceive or care about the potential havoc its decision might cause.

5. Finally, petitioners submit that summary judgment was the appropriate procedure to resolve the claim of privilege raised by them. It is clear that where a publication is protected by a rule of constitutional immunity "summary judgment, rather than trial on the merits, is a proper vehicle for affording constitutional protection in the proper case." *Bon Air Hotel, Inc.* v. *Time, Inc., supra,* 426 F.2d at 865. See Judge Van Dusen's dissent and the cases cited by him in Appendix B at 12b. "In the First Amendment area, summary procedures are . . . essential. For the stake here, if harassment succeeds, is free debate." *Washington Post Co.* v. *Keogh,* 365 F.2d 965, 968 (D.C. Cir.), *certiorari denied,* 385 U.S. 1011. As explained in *Time, Inc.* v. *Hill, supra,* 385 U.S. at 389, even the fear of the expense involved in the defense of protracted litigation "must inevitably cause publishers to 'steer . . . wider of the unlawful zone'." Hence, the need for summary proceedings in this area is plain.

Since "First Amendment questions of 'constitutional fact' compel this Court's de novo review" of the record in order to reach constitutional judgments, *Rosenbloom* v. *Metromedia, Inc., supra,* 403 U.S. at 54, this Court may

now appropriately review the instant decision of the court of appeals in order to independently determine whether as a matter of law the district court was correct in granting petitioners' motion for summary judgment.

CONCLUSION

For the foregoing reasons, we urge that the Court issue a writ of certiorari in order to review the important issues under the First Amendment raised by this case.

Respectfully submitted,

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February, 1974

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil No. 842-70

TRANSCRIPT OF PROCEEDINGS

MOTION FOR SUMMARY JUDGMENT

Newark, New Jersey

November 8, 1971

THOMAS TAGGART,

Plaintiff,

v.

WADLEIGH-MAURICE, LTD., and
WARNER BROS., INC.,

Defendants.

Before:

THE HONORABLE FREDERICK B. LACEY, U.S.D.J.

Pages 31-32

Appendix A

THE COURT: Here's where I come out on this, gentlemen. Going back to 1890, we recognize that there was at that time born out of an often-cited law review article the so-called right of privacy, the article being one by Warren and Brandeis dealing with New York.

The next eventful happening was the handing down of the decision we just talked about, the Roberson case. There the New York Court of Appeals determined that there was no right of privacy. That was quickly followed within a year, was it not, Mr. Dershowitz, by the passage of Sections 50 and 51 of the Civil Rights Law which barred commercial usage thereafter, and I simplify the language of the statute, The name, the picture, the portrait; that was the beginning then of the right of privacy in New York. Over the years that stood readily unassailable until we began to get the now long line of cases that teaches that the right of privacy is subject to the First Amendment, freedom of speech and press. And, of course, it is that, really, that brings you two to an impasse here.

Your argument, Mr. Farley, as I understand it, is that there is more involved here than the classic right of privacy invasion; that they in fact drew the man out, made him an involuntary actor and through his participation they are using him to make money without any compensation to him.

I react, as Mr. Dershowitz's remarks indicate, as the reasonable man might react after seeing the film. I come to a different conclusion after having seen the film than I did from reading just the dialogue. It was not so much a drawing out as to expose him to a substantial participation in the film. The event fits in a perspective of moving from one aspect of this festival to the next. He was not diverted from the work he was doing and brought, so to

speak, up on the stage and made somebody separate and apart from the fellow who was working at the time they focused the camera on him. It is a very difficult line to draw.

I believe as you do, as I indicated before the luncheon recess, that there still is an area left where somebody does set out deliberately to make somebody participate in gaining a profit without compensation to him. But there is still an area where that is not protected by the First Amendment cases. I do not think that falls on this side of the line. I feel that summary judgment is indicated and I will grant the motion.

Appendix A

ORDER FOR SUMMARY JUDGMENT

This matter being opened to the Court by Roger S. Clapp, appearing for Clapp & Eisenberg, attorneys for the Defendants, together with Nathan Z. Dershowitz of the New York Bar appearing *pro hac vice* for Stroock & Stroock & Lavan, of counsel for the defendants, in the presence of Charles J. Farley, Jr., appearing for Haggerty & Farley, attorneys for the plaintiff, on November 8, 1971, being the continued return date of the defendants' Motion for Summary Judgment in their favor as to all allegations of the complaint, upon the ground that the pleadings, depositions, affidavits and documents on file show palpably that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment as a matter of law, and the Court having heard and considered the arguments of counsel, and having read, reviewed and considered the pleadings, depositions, affidavits, briefs and documents on file and having seen in chambers excerpts of the movie "Woodstock" and being of the opinion that the defendants are entitled to summary judgment upon all issues, and for good cause shown:

It is on this 6th day of January 1972.

ORDERED, that the defendants' Motion for Summary Judgment be and it hereby is granted, and that summary judgment in favor of the defendants and against the plaintiff be entered on all issues with costs and disbursements to be taxed.

/s/ FREDERICK B. LACEY
Frederick B. Lacey, U.S.D.J.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 72-1531

THOMAS TAGGART,

Appellant,

v.

WADLEIGH-MAURICE, LTD. and
WARNER BROS. INC.,

Appellees.

(D.C. Civil Action No. 842-70)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Submitted Under Third Circuit Rule 12(6) July 2, 1973
Before GIBBONS and HUNTER, *Circuit Judges*

Reargued September 5, 1973
Before VAN DUSEN, GIBBONS and HUNTER, *Circuit Judges*

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OPINION OF THE COURT
(Filed September 21, 1973)

GIBBONS, *Circuit Judge*

This is an appeal from the grant of defendants' motion for summary judgment. The pleadings, affidavits, and depositions on file establish that the appellant Taggart is an employee of Port-O-San, a corporation engaged in the business of furnishing and servicing portable latrines. Taggart was sent by his employer to Bethel, New York in August, 1969 to service such portable latrines, furnished by Port-O-San to the promoters of the Woodstock music festival. While he was servicing the Port-O-San latrines he was, according to his complaint and deposition, diverted from that work and engaged in conversation by agents of defendant Wadleigh-Maurice, Ltd., who were filming the festival, and photographed by sound motion picture. Wadleigh-Maurice, Ltd. during the course of the festival took over 315,000 feet of film (about 120 hours of viewing). From this 315,000 feet of film a feature length "documentary" was assembled, which defendant Warner Bros. Inc. undertook to distribute for commercial viewing. There is no dispute that the festival, the preparation of the film, and its distribution to theatres were all undertaken for commercial profit-making purposes. In those parts of the 315,000 feet of film chosen

for inclusion in the "documentary" and thereby given widespread public dissemination is a sequence of approximately two minutes depicting Taggart emptying latrines. Taggart's deposition discloses the circumstances in which he was photographed:

"Q. Basically, at the time you were at Woodstock and you were approached by these two men, had you ever seen them before?

A. No, I never did.

Q. Did you know who they were?

A. No, I have no idea.

Q. How did they engage you in conversation?

A. Well, as I said before, as I was working these two men just came up and started talking to me. What are you doing there, I think was the key sentence. What are you doing there, they said.

Q. You responded to the conversation that ensued?

A. Yes. From there on, I went on about my business, about doing my work. As I was, they spoke to me and asked me what was this, and so forth.

Q. Did you respond to anything they asked you?

A. I responded to the questions they asked me.

Q. You mentioned before that they had cameras. How big were the cameras they had? Can you show us?

A. They looked like the little square box or something like that.

MR. FARLEY: Indicating about six inches long.

A. Maybe rectangular.

Q. Do you have a home movie camera yourself at home?

A. I have one, yes. It would be not in that category. It would be more like my son's. Thomas has one with a zoom thing on it and stuff like that.

Q. The camera that the man was holding, was that similar to the camera your son has?

A. It would be something like that.

Q. So the cameras were like home movie type cameras?

A. Yes.

Q. Did you see any of those large cameras that they used to depict when they show the news?

A. No.

Q. You didn't see anything like that?

A. No. Whatever it was they had was strapped. They had them in a strap on their neck.

Q. A strap to hold the camera?

A. Yes, a little bit of a strap.

Q. In the general vicinity through these days you were at the festival, were there many people with cameras of various types?

A. As I recall, I saw different types of cameras. I wouldn't say there was a wholesale thing with cameras there, you know.

Q. At any time did anyone ask your permission to take the picture?

A. Well, not that they asked me. Nobody came up to me and said, can I take your picture, nothing like that. They just came up and started talking. As they were talking——

Q. Was one talking to you and the other took the picture?

A. It was a combination. I don't know if I'm making myself clear here . . .

. . .

Q. In relation to the two men taking your picture,

did you know that they were taking it for any public release?

A. No. I had no idea of that."

Taggart contends that the sequence in which he was interrogated while performing his necessary though not necessarily pleasant employment was edited into the "documentary" in such a way as to achieve, at his expense, a comic effect. That this may well have been the intended and actual effect is supported by evidence in the record of the reaction of critics. For example, Kathleen Carroll, the critic, stated "[T]he funniest scene shows the latrine attendant proudly demonstrating his job." Craig McGregor, writing in the New York Times, April 19, 1970, stated " . . . and the man who is the real schizophrenic hero of Woodstock, the Port-O-San man who empties the latrines of the beautiful people and has one son there at Woodstock and another flying a DMZ helicopter in Vietnam." Taggart contends that while he was engaged in his ordinary work he was without warning, and without consent, drawn into a conversation and photographed so that the sequence could be used as a key part of the theme of the "documentary" which was being prepared as a commercial enterprise.

When Taggart learned that he had been included in the commercial film he protested to the defendants, but they refused to delete the scene and proceeded to distribute the film nationwide. As a result, he alleges, he has suffered mental anguish, embarrassment, public ridicule, and invasion of his right to privacy which has detrimentally affected his social and family life and his employment. His deposition supports his contention that such ongoing damaging effects have occurred and are continuing. In this diversity civil action he seeks damages and an injunction

against continued distribution of the offending scene. The complaint contains a demand for a jury trial. Fed. R. Civ. P. 38(b).

Moving for summary judgment, the defendant placed principal reliance on *Man* v. *Warner Bros. Inc.*, 317 F. Supp. 50 (S.D.N.Y. 1970). In that case Man, a professional musician, was at Woodstock, where at 4 A.M. he mounted the stage and played "Mess Call" on his Flugelhorn. His performance was photographed by the Wadleigh-Maurice camera crews, and was edited into the documentary without his consent. He brought a diversity action for injunctive relief pursuant to New York's right of privacy statute, N.Y. Civ. Rights Law § 51 (McKinney's 1948), and moved for a preliminary injunction. The defendant made a cross motion for summary judgment, which was granted. The district court recognized that § 51 may not be applied to afford relief either to a public figure or in a matter of public interest in the absence of proof that the defendant published false material with knowledge of its falsity or in reckless disregard of the truth. *E.g., Time, Inc.* v. *Hill,* 385 U.S. 374 (1967). In justification for the grant of summary judgment the court pointed out (1) that a professional musician who mounts a stage to give a performance before an audience of 400,000 is a public figure, (2) that in any event the depiction of his performance was merely a factual depiction of his participation in a newsworthy event, and (3) that plaintiff's forty-five second performance was *de minimis.*

The transcript of the argument on the motion for summary judgment in this case discloses that the district court appreciated several distinctions between this case and *Man.* First, Taggart was not a professional musician performing before an audience of 400,000. He was an ordinary

working man going about his lowly task. Second, the reaction of the critics suffices to prevent the entry of summary judgment on a *de minimis* basis. The latrine sequence apparently makes a significant and memorable contribution to the film's overall impact. Thus, if summary judgment is to be sustained, it must be sustained solely because Taggart was a participant in a newsworthy event, and as such, outside the protection of § 51 or some other statutory or common law right of privacy.[1] The district judge recognized, however, that it would be one thing to photograph Taggart as he went about his duties at a newsworthy event and to include such a photograph in a factual description of the event, but quite another thing to deliberately draw him out in conversation for the purpose of making him an inadvertent performer in a sequence intended to be exploited for its artistic effect. Recognizing this distinction, the district judge viewed the offending film sequence, and ruled:

> "I react, as Mr. Dershowitz's remarks indicate, as the reasonable man might read after seeing the film. I come to a different conclusion after having seen the film than I did from reading just the dialogue. It was not so much a drawing out as to expose him to a substantial participation in the film. The event fits in a perspective of moving from one aspect of this festival to the next. He was not diverted from the work he was doing and brought, so to speak, upon the stage and made somebody separate and apart from the fellow

[1]Taggart resides in New Jersey. The governing law in New Jersey on the right of privacy from commercial exploitation is discussed in Canessa v. Kislak, Inc., 97 N.J. Super. 327, 235 A.2d 62 (L. Div. 1967). We do not here reach the issue of which state's law governs.

who was working at the time they focused the camera on him. It is a very difficult line to draw.

I believe as you do, as I indicated before the luncheon recess, that there still is an area left where somebody does set out deliberately to make somebody participate in gaining a profit without compensation to him. But there is still an area where that is not protected by the First Amendment cases. I do not think that falls on this side of the line. I feel that summary judgment is indicated and I will grant the motion." (Tr. at 32).

The difficulty with this ruling is that it chooses between Taggart's version, that he was drawn out and made an involuntary performer, and the defendants' version, that he was a mere participant in a newsworthy event. The court did so on the basis of a view of a part of the whole film. The sequence which he viewed undoubtedly was significant evidence in support of the defendants' position. But it was only evidence to be weighed against Taggart's deposition and the reaction of the critics. That weighing process was made before the plaintiff had had the opportunity to present his full case, and it was made by the judge in a case in which a jury trial was demanded. Whether Taggart had been drawn out as a performer rather than merely photographed as a participant in a newsworthy event is on this record at best a mixed question of law and fact. Factual determinations in a § 51 case are for the jury. *Garner* v. *Triangle Publications, Inc.*, 97 F. Supp. 546 (S.D.N.Y. 1951).

Clearly, then, the record presents disputed fact issues. We can affirm the grant of summary judgment on such a record only if we are prepared to hold that as a matter of law the defendants are entitled to judgment even if Tag-

gart was deliberately drawn out as a performer in a commercial film. Such a ruling would leave very little to § 51 or to any similar statutory or common law right of privacy. It would be predicated upon a more absolutist interpretation of the first amendment than has yet been espoused by a majority of the Supreme Court. But more important, such a ruling, if it is to be made, should be made on a record in which the facts have been fully developed. Only with such a record can the necessary balance between the conflicting rights of personal privacy and of freedom of expression properly be struck. We realize that requiring the defendants to defend in a trial rather than to obtain summary judgment puts them to additional expense, and arguably subjects their first amendment rights, should those rights ultimately be held to prevail over Taggart's right to privacy, to that much extra "chill." In the context of the problem—their commercial exploitation of Taggart's allegedly induced performance—this degree of "chill" seems to us *de minimis* when compared with the unsatisfactory alternative of ruling on a potentially serious conflict between legally protected rights without a complete record.

Judge Van Dusen, dissenting, urges that where "constitutional fact" is involved a district court may on a motion for summary judgment, or an appellate court may on appeal, resolve disputed fact issues. Article III, Section 2 of the Constitution gave the Supreme Court appellate jurisdiction "both as to Law and Fact". This clause produced an adverse public reaction which resulted in the seventh amendment preserving the right to trial by jury in civil cases and providing further that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Disputes over "constitutional fact" are no excep-

tion to the seventh amendment. *See, e.g., Vandenburg* v. *Newsweek, Inc.*, 441 F.2d 378, 379 (5th Cir.), *cert. denied*, 404 U.S. 864 (1971), affirming denial of summary judgment. Just as disputed facts in a nonjury case are determined by trial and not on summary judgment motion, a trial judge's decision to instruct the jury with the *New York Times* standard or an appellate court's de novo review of "constitutional fact" are both made after a full trial on the contested factual issues. Properly viewed these represent nothing more than the application of a governing legal standard to undisputed facts or to facts that are viewed in a light more favorable to one party. They do not involve the resolution of such credibility issues as whether or not Taggart was drawn out or was a willing participant. The label "constitutional fact" does not permit even an appellate court reviewing a full record to resolve credibility issues.

The judgment of the district court will be reversed and the case remanded for further proceedings consistent with this opinion.

VANE DUSEN, *Circuit Judge*, dissenting:

I respectfully dissent and would affirm the granting of summary judgment by the district court.

The court has today characterized the issue before the district court as whether Mr. Taggart was "drawn out" and made an involuntary performer or whether he was a mere participant in a newsworthy event and concluded that such factual determinations are for the jury. If this case involved only the application of the New York statute to the factual situation presented here, I would agree that summary judgment was improperly granted.

However, the central issue before the district court was whether the rule of *Time, Inc.* v. *Hill*, 385 U.S. 383 (1967),

applied to the facts of this case. The question of whether or not Mr. Taggart was a participant in a newsworthy event, even if properly characterized as one of fact, involves a constitutional decision as to the proper application of a First Amendment standard. It must, therefore, be considered one of "constitutional fact" which the Supreme Court has said to be subject to de novo review.[1] *Rosenbloom* v. *Metromedia,* 403 U.S. 29, 53-54 (1971) (opinion of Brennan, J.). In *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 285 (1964), the Court said:

> "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' [Citing case.] In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.'"

It follows that at trial such issues are properly decided by the judge on a motion for summary judgment, where there are no other genuine issues of material fact.

[1]Indeed, in the very cases which first enunciated the First Amendment privilege claimed here, the Supreme Court determined for itself the question of whether the facts alleged and proved at trial met the standard as to what kind of public official or public issue would require a showing of actual malice to allow recovery in a libel action. See *New York Times Co. v. Sullivan,* 376 U.S. 254, 270-71 (1964); *Associated Press* v. *Walker,* 388 U.S. 130 (1967).

Appendix B

Furthermore, the Supreme Court has stated that in cases where a First Amendment privilege is claimed under the doctrine of *New York Times Co.* v. *Sullivan, supra,* "as is the case with questions of privilege generally, it is for the trial judge in the first instance to determine whether the proofs show respondent to be a 'public official'." *Rosenblatt* v. *Baer,* 383 U.S. 75, 88 (1966). Lower courts have generally assumed with little or no discussion that the question of whether a particular event constituted a matter of "public interest" is also for the trial judge to determine. *See, e.g., Bon Air Hotel, Inc.* v. *Time, Inc.,* 426 F.2d 858, 861-62 (5th Cir. 1970); *Wasserman* v. *Time, Inc.,* 424 F.2d 920, 922 (D.C. Cir.), *cert. denied,* 398 U.S. 940 (1970); *Time, Inc.* v. *McLaney,* 406 F.2d 565, 566 (5th Cir. 1969); *United Medical Laboratories, Inc.* v. *Columbia Broadcasting System, Inc.,* 404 F.2d 706, 711-12 (9th Cir. 1968); *Cerrito* v. *Time, Inc.,* 302 F. Supp. 1071, 1073 (N.D. Cal. 1969); *Sellers* v. *Time, Inc.,* 299 F. Supp. 582, 586 (E.D. Pa. 1969), *aff'd on grounds of state law,* 423 F.2d 887 (3d Cir. 1970). As I understand the claim that Mr. Taggart was "drawn out," the issue is whether the brief questioning[2] of Mr. Taggart in the midst of the Woodstock

[2]The text of the dialogue from the film is as follows:

"Taggart: 'Okay. Somebody left their cane in here. Some poor fellow will come looking for his cane.'

"Male Voice: 'You're getting a little behind on this job aren't yuh?'

"Taggart: 'Oh, they've been behind right along, besides it's not the idea of being behind it's you just can't keep up that's what it is.'

"Male Voice: 'Usin' a-quite a bit o' that stuff, huh? (Referring to a spray.)

"Taggart: 'Yeah. That helps give yuh a little pleasanter uh, odor, you know. Yeah, with the disinfectant in there and you put

festival was an event of public interest. A decision on a motion for summary judgment was, therefore, appropriate.

Turning to the substantive question as to whether that decision was correct, it seems clear that this case falls within the rule of *Time, Inc.* v. *Hill, supra.* Since no showing of actual malice was made in the trial court, summary judgment was properly granted.

There is no question that the Woodstock festival itself was an event of public interest nor that Mr. Taggart, by his presence there, was a participant in it. Furthermore, counsel for appellant has conceded in oral argument that if Mr. Taggart had only been filmed and not interviewed, this action would be barred. I fail to see why the mere fact of the brief questions asked should alter that result.

There may arise cases where a reporter or film maker conducts an interview in such a way as to lose the constitutional privilege of *Time, Inc.* v. *Hill, supra.* For example, where an incident is staged, as in the television series "Candid Camera," it would not seem to be an event of public interest. But here Mr. Taggart was simply filmed going about his ordinary occupation and asked a few questions that directly related to his participation in, and opinions on, a clearly newsworthy event. This is a common and important technique of investigative reporting and should enjoy the same constitutional protection as would a

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your deodorant bars in, makes it a little more pleasanter to go in there an' use it.

"Taggart: 'That is it, gentlemen.'

"Male Voice: 'Well, you're doing a good job here.

"Taggart: 'Thank you very much (laughs). Glad to do it for these kids. My son's here too. An' I got one over in Viet Nam too. He's up in the DMZ right now. Flyin' helicopters. Okay, see yuh later.' "

written or filmed account of that event. I would affirm the district court's granting of summary judgment.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix B

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit Rule 12(6) and later argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed January 5, 1972, be, and the same is hereby reversed, and the cause remanded for further proceedings consistent with the opinion of this Court. Costs taxed against appellees.

ATTEST:

/s/ THOMAS P. QUINN
Clerk

September 21, 1973

Appendix B

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

The petition for rehearing filed by

Appellees

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ JOHN J. GIBBONS
Judge

Dated: October 24, 1973

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-688

WADLEIGH-MAURICE, LTD., and
WARNER BROS., INC.,

Petitioners,

v.

THOMAS TAGGART

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 21, 1974.

/s/ WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme Court of the United States

Dated this 16th day of
January, 1974.